

PROGRESS REPORT

Comm 47 CODE ADVISORY COMMITTEE

DATE: Wednesday, April 14, 2004

TIME: 9:00 a.m. – 3:00 p.m.

LOCATION: Tommy G. Thompson Commerce Center, First Floor Conference Room
201 West Washington Avenue
Madison, Wisconsin

COMMITTEE MEMBER ATTENDANCE:

Dave Blatnik	Absent	Mark Maten (Steve Osesek)	P
Richard Blatter	A	Kevin Olson	P
Tim Clay	A	Robert Pearson	A
Dave Diedrich	Present	Boyd Possin	P
Scott Hafner (Troy Batzel)	P	Tom Reinsch	A
David Havick	A	Scott Wilson	P
George Marek	A	Wendell Wojner	P

GUESTS:

Kendra Bonderud – Legislative Fiscal Bureau
Ray de Long – REI
Pat Heger – Bt²

Gary Henningsen – Northern Environmental
Robert Langdon – Bt²

DEPARTMENT OF COMMERCE STAFF:

Oscar Herrera	Berni Mattsson
Lori Huntoon	Sam Rockweiler
John Kisiel	Eric Scott
Dennis Legler	

Dennis Legler opened the meeting with a review of the agenda, and noted the meeting would focus on the draft rules that were transmitted to the Committee prior to the meeting.

Draft rules for public bidding

Dennis explained that based on the discussion during the preceding, March 9 committee meeting, proposed section Comm 47.69 was revised to require use of one of the bidders for a site, rather than use of the lowest, qualified bidder.

Scott Wilson noted that when a new consultant begins work at a site after other work has been performed by a previous consultant, obtaining the data or reports compiled by the previous consultant can be difficult. Eric Scott noted the Department likewise has had difficulty obtaining that information, and the Department is moving toward periodic reporting in order to lessen that difficulty. Gary Henningsen recommended requiring submittal of a claim whenever a determination is made that further work for an occurrence will be routed through the public-bidding process. Scott added that if separate consultants are involved with separate stages for an occurrence, a claim submittal should be required for each consultant's work. Boyd Possin added that any required claim submittals should be referenced in the bidding specifications. Kevin Olson noted some uncertainties may arise in determining associated interest costs. Steve Oseseck and Kevin recommended setting a time limit of 120 days for submitting a claim, after completing a designated scope of work, and allowing waiver of interim submittals for small scopes of work that do not include a change to a different consultant.

Kevin asked whether the proposed allowance in Comm 47.70 (3) (b) for additional costs that are due to specified changes in circumstances would include costs for remobilizing, such as after an extreme storm. Kevin noted this latitude in the allowance would be beneficial because of the compression that bidding is putting on other costs which could otherwise offset some changes in circumstances.

Steve asked whether the reference in 47.70 (3) (a) to discovering substantial new contamination would be interpreted to include finding free product in more monitoring wells than initially found, rather than only finding free product at a site where no free product was found initially. Boyd and Scott agreed the included definition of substantial new contamination should be broad enough to include finding substantial additional contamination.

Scott questioned whether the Department needs to be involved with assuring that subcontractors receive payments within contracted timelines, as proposed in 47.70 (4) (a) 4. Dave Diedrich explained that lending institutions need the assurance, and there was consensus to clarify the section to be consistent with the clarification recommended at the preceding meeting, for disqualifying potential bidders who fail to pay subcontractors within contracted timelines.

Boyd asked whether costs for the reports proposed in 47.71 for existing sites will be capped through the Department's schedule of usual and customary costs, and Eric said yes. Pat Heger

asked whether that schedule will apply to existing sites which are beyond the site investigation stage and which have not passed through the public-bidding process, and Eric indicated it would. Boyd noted a need for further discussion of how those sites will be addressed by either that schedule or public bidding.

Draft rules for arbitration

In referring to the previously transmitted draft, Dennis noted that the statutes require the Department to establish rules for arbitration. Kevin asked whether a number of arbitrators would be available for the process. John Kisiel referenced two associations of arbitrators, and reported several attorneys may be interested. John added that the arbitration process would have various costs, compared to the process for appealing claim denials, which is currently free. Boyd commented that the initial efforts in legislating creation of an arbitration process were based on a desire to have an expedited, conclusive alternative to the appeal process. There was agreement to ensure that the specified time periods in the rules are consistent with the corresponding time periods in the statutes.

Draft rules for reducing deductibles, based on financial hardship

Dennis explained that the transmitted draft for reducing these deductibles is authorized by the statutes, and could be used in addition to the current process for deferring payment of a deductible until a property is sold. According to Dennis, reducing a deductible that currently exceeds an owner's equity in a property could encourage that owner to proceed with remediating the property. Based on a recommendation from Scott, there was consensus to enhance the effectiveness of the proposal by changing the reduced deductible to a flat amount of \$2500, rather than refer to variable, unspecified amounts above that. Steve suggested allowing retroactive application of the reduction, to sites where investigations or remediations are already underway.

Draft rules for sites with old and new tanks

Dennis explained that the transmitted draft for these sites would establish reimbursement rates ranging from 100 percent to 25 percent, depending on whether a discharge from the old tank is [1] clearly not mixed with a discharge from a new tank which is excluded from PECFA coverage under 47.02 (3) (g), [2] mixed with a discharge from an excluded new tank, and [3] unknown as to whether it, rather than a later discharge from an excluded new tank in the same tank bed, created the contamination.

Boyd recommended limiting the reimbursement in [3] to sites where replacement of old tanks occurred in compliance with the applicable requirements in chapter Comm 10, particularly (1) the tank closure and site assessment requirements, and (2) the corresponding deadlines for performing that closure and assessment. There was agreement that this limitation would benefit owners who have complied with the Comm 10 requirements, and would avoid rewarding owners who have not, but Kevin noted the intent of the PECFA program is to achieve remediation of

sites, and if the remediation would not occur because of the limitation, the limitation could be counterproductive. Gary Henningsen asked whether the 25 percent reimbursement rate in [3] could be applied retroactively to sites where reimbursements have already been completed. Dennis noted the Comm 10 tank closure and site assessment requirements were preceded by corresponding, similar, federal requirements, and the 25 percent reimbursement rate could be applied to sites that complied with those federal requirements as well, and Boyd agreed.

Draft rules for penalized ineligible costs

Dennis explained that the transmitted draft for penalizing submittal of these ineligible costs was developed in response to a statutory requirement.

Kevin commented that submitting a claim which somewhat exceeds an established reimbursement cap is not unwise, because if part of the claim is denied, the overall claim can then fall below the cap. There was agreement to delete cap-exceedance costs from the proposed list of penalized ineligible costs, but to continue listing them in Comm 47 as ineligible costs.

Boyd recommended that placing of pavement be an eligible cost, rather than an ineligible or penalized ineligible cost, wherever capping a site in that manner is the most cost-effective means or component of closing the site.

Draft rules for priority claims

Dennis explained that the transmitted draft for modifying the current criteria for priority claims reflects the current use of \$60,000, rather than \$80,000, as the upper limit for priority review of general claims. Based on a recommendation from Scott, there was agreement to delete reference to the Department providing direction on whether to prepare a remedial action plan with those claims. Dennis noted the draft also incorporates the priority reviews that the statutes require for tanks at schools and farms, and for home oil tanks.

Draft rules for credentials

Dennis explained that the transmitted draft for modifying the current credential rules would primarily establish criteria for a PECFA program manager, who would be responsible for efficiently managing the financial aspects relating to PECFA claims. Scott indicated the Department could have difficulty administering the minimum experience requirement proposed as a qualification for writing the manager examination. There was agreement that if the examination is developed thoroughly, and if the frequency for retaking the exam is adequately limited, the minimum experience requirement could be deleted. Boyd noted the exam could include references to requirements that may still apply from earlier statutes.

Kevin questioned the purpose of continuing to register individual PECFA consultants, if PECFA program managers are certified and if consulting firms are required to assign only registered

professionals to perform or supervise professional-level work, such as engineering. Dennis responded that certifying individual consultants allows the Department to exclude inadequate performers from doing further PECFA work.

Pat Heger asked whether the Department would use its Web site to post the names of individuals and firms that are issued or denied credentials. Dennis noted the Web site currently shows the parties that have active credentials. Scott agreed registration of individual PECFA consultants should continue, and noted the draft should also limit soil science work to licensed professional soil scientists. There was consensus that the draft rules should require consulting firms to ensure that only registered PECFA consultants perform the PECFA consultant services enumerated in Comm 5.81 (1) (b).

Boyd asked when the rule changes for credentials could become effective. Berni Mattsson said the changes for existing credentials could take effect during renewals. Lori Huntoon explained that the Department's renewal notices could inform individuals and firms of a need to submit proof of any applicable registration or licensure by the Department of Regulation and Licensing, or proof of supervision by individuals with that registration or licensure.

Next meeting

The next meeting was scheduled for May 12, 2004, at the same time and location, except in Conference Room 3B. The meeting is expected to include, as a primary topic, discussion of draft rules and implementation for the Department's schedule of usual and customary costs. Several members indicated an interest in receiving the draft rules and schedule in advance of the meeting.

Submitted by Sam Rockweiler, code consultant to the Committee
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